89-780

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

KATHLEEN STONEKING

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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39 pp

I. QUESTIONS PRESENTED

A. Are school students "at liberty" so that, under the rationale of this Court in *DeShaney v. Winnebago County* there exists no duty under the Fourteenth Amendment for school administrators to protect them from criminal assaults?

B. Was there clearly established law in 1979 that school administrators had a duty under the Fourteenth Amendment to protect school students from criminal assaults?

C. Can this Court's holding in *City of Canton v. Harris* that municipal bodies may be held accountable for a policy amounting to "deliberate indifference" to the rights of citizens be extended to create a new theory of personal liability for municipal officials?

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes and Rules

IV. OPINIONS BELOW

A. Procedural History of This Case

The Opinion and Order of the United States Court of Appeals for the Third Circuit on remand (the Order sought to be reviewed) is printed in the Appendix hereto, page 1.

The procedural history of this appeal is as follows: On August 28, 1987, the United States District Court for the Western District of Pennsylvania, at Civil Action No. 87-63 E in that Court, denied a Motion for Summary Judgment submitted by all Defendants; its Opinion is reported at 667 F.Supp. 1088 (W.D.Pa. 1988), and is printed in the Appendix hereto at p. 73. Defendants Frederick Smith, Richard Miller and Frederick Shuey [hereinafter "Smith, Miller and Shuey"] appealed that Order to the United States Court of Appeals for the Third Circuit insofar as the District Court had denied their Motion for Summary Judgment on the basis of qualified immunity. The Court of Appeals affirmed the District Court by Opinion and Order dated September 12, 1988, at No. 87-3637 in that Court. That Opinion is reported at 856 F.2d 594 (3d Cir. 1988), and is printed in the Appendix hereto at p. 121.

Smith, Miller and Shuey then filed a timely Petition for Writ of Certiorari with this Honorable Court. This Court granted the petition on March 6, 1989, summarily vacated the Order of the Court of Appeals, and

remanded the case for reconsideration in light of this Court's ruling in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 109 S.Ct. 998 (1989). That Order is printed in the Appendix hereto at p. 151 and is reported at 109 S.Ct. 1333.

On remand, the Court of Appeals again affirmed the District Court by Opinion and Order dated August 16, 1989. As noted, that Opinion is printed in the Appendix beginning at page 1. It is this Opinion and Order which is the subject of the current petition.

B. Related Proceeding

This case is related to a second proceeding also pending in this Honorable Court. One of the witnesses in this case, Judy Grove (now by marriage Sowers) alleged that the same former teacher assaulted her in his home one afternoon during summer vacation when she voluntarily visited him there while she was intoxicated. She made claims similar to those asserted by Stoneking in this case against the same defendants.

On August 29, 1988, the United States District Court denied a Motion to Dismiss by the Defendants, *Sowers v. Bradford Area School District et al.*, C.A. No. 88-57 Erie in that Court. The Opinion of the District Court in that case is reported at 694 F.Supp. 125 and is reprinted in the Appendix hereto at page 155. The Court of Appeals affirmed on January 31, 1989, by judgment order stating that the prior ruling of that Court in *Stoneking* "is essentially controlling here." *Sowers v. Bradford Area*

School District et al., No. 88-3640 in the United States Court of Appeals for the Third Circuit. That Order is reproduced in the Appendix hereto at p. 197.

After a timely petition, on April 3, 1989 this Court granted certiorari, vacated that judgment and remanded that case as well for reconsideration in light of *DeShaney*. *Smith v. Sowers*, No. 88-1350 in this Court. That Order is reproduced in the Appendix at p. 203. On remand, the Court of Appeals again affirmed the District Court, again by judgment order holding that "an affirmance at this stage of the litigation is essentially required by the panel's opinion on remand from the Supreme Court in *Stoneking* . . .". Judgment Order at No. 88-3640 in that Court, September 28, 1989. That Order is reproduced in the Appendix at p. 207.

A Petition for a Writ of Certiorari has been prepared in that case and is intended to be filed simultaneously with this Petition.

V. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254.

The Opinion and Order of the United States Court of Appeals for the Third Circuit was entered on August 16, 1989. App., page 1. A Petition for Rehearing *in banc* was filed and denied by the Court on September 12, 1989.

Jurisdiction for the appeal to the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. § 1291. The appeal to the United States Court of Appeals for the Third Circuit was made in accord with *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which holds that a denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291.

Jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by Plaintiff based upon 28 U.S.C. § 1983.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

B. Federal Statutes

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

C. State Statutes

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 Pa.C.S.A. § 13-1317.

VII. STATEMENT OF CASE

The record supports the following findings of fact: In the fall of 1979, a high school senior, Judy Grove (now by marriage Sowers), complained to Smith and Miller that she had been sexually assaulted the previous summer after she had gone to Wright's house, while intoxicated, following a family sponsored gathering. An investigation followed in which Wright denied the charges. Notwithstanding this denial, Smith ordered Wright never to get into a "one on one" situation with female students again. Grove alleged no further contact with Wright; she graduated in June, 1980.

The following fall (1980), Stoneking alleges that Wright began to make sexual advances towards her while she was babysitting for him. She alleges that sexual abuse then began during private music lessons at his home or at the school; in his car; during the school day when "the opportunity arose"; and even after her graduation in 1983 when Stoneking returned to Bradford during a college vacation. She also claimed that Wright abused her in a dormitory room during a summer band camp at Indiana University of Pennsylvania after she had graduated from high school and she voluntarily visited him there.

Stoneking never told her parents, nor any employee of the school district, about this conduct; nor did she ever report it to the police or any of her friends. She does not allege that she was ever intimidated, threatened

or coerced by any school administrator, nor does she even contend that any school administrator actually knew at any time that she was being assaulted by Wright.

VIII. ARGUMENT

A. Summary of Argument

The Court of Appeals failed to explicitly resolve the direct question posed by this Court when it granted certiorari and remanded the case for reconsideration in light of *DeShaney*. However, the practical effect of the opinion is to leave these school officials exposed to trial and possible liability under a theory that they had a duty to protect school students from harm, which duty they allegedly failed to discharge. This *sub silentio* holding is directly contrary to *DeShaney*.

The Court of Appeals acknowledged, however, that there was "uncertainty" in the law regarding the duty to protect. On that basis alone, Smith and Miller should have been granted immunity and dismissed from the suit.

The alternative rationale employed by the Court of Appeals is also insufficient. The Court extended the rationale of this Court's holding last Term in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989), to create a new theory of personal liability for school officials in their individual capacities. But the Court does not explain how a failure to properly perform *official* duties results in *personal* liability. The Court's rationale conflicts with this Court's prior holding in *Rizzo v. Goode*, 423 U.S. 362 (1976).

The notion that public officials can be held *personally* liable for acts done within the scope of their official

duties is both novel and dangerous, and ought to be reviewed by this Honorable Court.

B. The Court of Appeals Failed to Resolve the Question Posed by This Court

When this Honorable Court granted certiorari in this case initially, it vacated the judgment of the Court of Appeals and remanded the case with specific instructions to reconsider its opinion "in light of *DeShaney*". App. at p. 151. But the Court of Appeals avoided this question, ostensibly grounding its decision instead on a new theory of liability.

The failure of the Court of Appeals to expressly rule on the *DeShaney* issue has the practical effect of denying Smith, Miller and Shuey's claim of qualified immunity with respect to the "duty to protect" theory of liability. In the current posture of the case, the trial court may choose to charge the jury that Smith, Miller and Shuey had a duty under the Fourteenth Amendment to protect Stoneking from the harm which allegedly befell her; the opinion of the Court of Appeals broadly hints that such a charge would be acceptable to it. Thus Smith, Miller and Shuey have for all practical purposes lost their immunity from suit with respect to this theory of liability. This is just as effective as an express holding that a duty to protect exists under the Fourteenth Amendment.

The Court of Appeals did discuss *DeShaney*, strongly suggesting that it would have ruled that its prior

ruling was "not inconsistent with the *DeShaney* opinion." Slip Opinion at p. 7, App. p. 9. But the Court refused to make an explicit holding on this basis, "because the uncertainty of the law in this respect may cause further delay."[1] The Court then announced a different theory under which it affirmed its prior ruling.[2]

Smith, Miller and Shuey respectfully suggest to this Court that the response of the Court of Appeals is not sufficient. If the law in this area is uncertain, it is the Court's job to resolve the uncertainty; the doctrine of qualified immunity requires this.[3]

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1 This statement would seem to compel a ruling that Smith, Miller, and Shuey are entitled to qualified immunity, because liability cannot attach unless the law regarding a duty to protect was "clearly established" at the time of the incidents of which Stoneking complains. *See* discussion at p. 20, *infra.*

2 The Court of Appeals went on to, in effect, decide a motion for summary judgement on the merits that Smith and Miller were never permitted to argue. That is, is there sufficient evidence in the record from which a jury could conclude that Smith and Miller actually encouraged Wright's misconduct? Smith and Miller, like Judge Stapleton in dissent, strongly believe there is not sufficient evidence to make such a finding, and would have liked the opportunity to present argument on that issue before the Court of Appeals majority issued its ruling *sua sponte*.

3 Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question of whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

1. The Court of Appeals' opinion conflicts with Supreme Court precedent

In *DeShaney*, this Court held that the State is under no obligation to protect a person from harm unless the State has so deprived that person of his or her liberty that he or she is unable to protect him or herself. The Court of Appeals on remand in this case claims that its earlier discussion of "functional custody" is "[a]rguably . . . not inconsistent with the *DeShaney* opinion." Slip opinion, p. 7, App. at p. 9. The Court implies that Pennsylvania's mandatory school attendance law[4] constitutes a sufficient restraint on liberty to create a duty to protect under the *DeShaney* rationale.

In *DeShaney*, the Supreme Court held that

> when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. [citation and footnote omitted] The rationale for this principle is simple enough: when the State *by affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself*, and at the same time fails to provide for his basic human needs—*e.g.* food, clothing,

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[4] 24 Pa.C.S.A. §13-1317

> shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [citations omitted] *The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.* [citation omitted] In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—*through incarceration, institutionalization, or other similar restraint of personal liberty*—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

109 S.Ct. at 1005-06 [emphasis supplied].

This language makes it absolutely clear that, in this case, neither the school district nor its administrators violated any substantive Constitutional right of Stoneking. Stoneking alleges no facts from which one can reasonably find such a complete deprivation of liberty. Simply put, mandatory public school attendance does not impose affirmative restraints on liberty from which a duty of protection can arise.

It cannot be said that school attendance is a "restraint of liberty" similar to "incarceration" or "institutionalization," contexts where the Courts recognize a duty to protect. Indeed, this Court long ago recognized the significant differences between the school setting and a prison. In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court held

> [T]he public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Id., 430 U.S. at 670, 97 S.Ct. at 1412.

2. *The Court of Appeals opinion conflicts with rulings in other circuits*

The opinion of the Court below also implies openly that school children, when attending school, are analogous

to children placed in foster homes who are mistreated by foster parents. Slip opinion at p.8., App. at p. 10. Since the *DeShaney* opinion expressly left open the question of whether liability would exist in that circumstance, *see* 109 S.Ct. at 1006, n. 9, the clear implication is that the Court would find that a duty to protect those foster children exists, and by analogy a duty to protect school children exists. This position, however, has already been rejected by two different Circuits. *See Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied* 1989 U.S. LEXIS 4189 (1989) and *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989).

3. The Court of Appeals opinion conflicts with other rulings of that Court

The *sub silentio* holding by the Court of Appeals that school officials have a duty under the substantive component of the due process clause to protect school children is also in conflict with the holding of another panel of that Court. In *Philadelphia Police and Fire Association for Handicapped Children, Inc., et al v. City of Philadelphia*, 874 F.2d 156 (3d Cir. 1989), a unanimous panel of the Court of Appeals held that no such substantive right exists in a closely analogous situation.

In that case, a class comprised of recipients of mental retardation services filed suit to prevent the Commonwealth of Pennsylvania and the City of Philadelphia from reducing the level of services available to them, claiming a violation of equal protection and a substantive

due process right to services. The Court analyzed the substantive due process claim in light of *DeShaney*, and concluded that no such rights exist. The Court noted that

> the class contends that because Pennsylvania's statutory scheme requires the mentally retarded to enter the system through the BSU's, where a plan for their care, including a placement determination, is made, the state has custody over those mentally retarded assigned to live at home. Their reliance on state-provided services, they claim, makes them absolutely dependent upon the state. Similarly, it is asserted that cessation of services will end in literal incarceration. [footnote omitted] *DeShaney*, however, forecloses the class' constructive custody argument because it makes clear that a "state's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint on personal liberty" is a prerequisite to the state's obligation to provide care. *DeShaney*, 57 U.S.L.W. at 4221. . . . Under [*DeShaney*] it is impossible to find an affirmative state duty to protect the mentally retarded living at home.

The Court went on to note that the fact that the class members "participated in state-sponsored day pro-

grams" was not sufficient to satisfy *DeShaney's* custody requirement. The Court held that "[i]n light of *DeShaney*, we do not believe that such intermittent custody gives rise to an affirmative duty on the state's part."

The parallels to the case at bar are obvious. In the *Philadelphia Police and Fire Association* case, the state mandated the delivery of services through the base service unit; this is analogous to the mandatory school requirement law relied upon by the *Stoneking* Court. In the *Philadelphia Police and Fire Association* case attendance at state-sponsored "day programs," presumably required by the BSU, was seen as only "intermittent custody" which did not give rise to a duty to protect; but the Court of Appeals in *Stoneking* would apparently find that just such intermittent contact would give rise to such a duty. The Court's opinion in *Stoneking* is in clear conflict with the unanimous opinion of the panel in *Philadelphia Police and Fire Association*.

C. *Smith, Miller and Shuey Are Entitled to Qualified Immunity*

This appeal, of course, arises in the context of the doctrine of qualified immunity.

The application of qualified immunity is an objective test under *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As Judge Stapleton correctly phrased the inquiry in his dissenting opinion below, would reasonable school officials with the

knowledge allegedly possessed by Smith and Miller have realized in 1980 to 1983 that they were violating a well-established duty owed to Stoneking under federal law?

To begin with, the Court of Appeals' own observation of "the uncertainty of the law in this respect", Slip opinion at 8, App. p. 10, proves beyond cavil that there was not, and is not even today, any "well-established duty" or "clearly established law" in this area. In the absence of a violation of clearly established law, an individual defendant is entitled to qualified immunity from suit. *Mitchell v. Forsyth*, 472 U.S. at 526. On this basis alone, the Court should have recognized that Smith, Miller and Shuey are immune from Stoneking's claims, and dismissed the case as to the individual defendants.

But the Court of Appeals did not end its inquiry there. Instead, it went on to hold that there was another "clearly established" duty that Smith and Miller may have violated; that is, a duty not to encourage sexual abuse of students by teachers.

To pose the proper question in terms of qualified immunity, should Smith, Miller and Shuey have realized in 1980-83 that their response to the allegations of Wright's sexual assault of Judy Grove in 1979 was tantamount to encouragement for Wright to assault other female students, and thus violated clearly-established law prohibiting

them from giving such encouragement?[5]

It is conceded that Smith and Miller, as reasonable school officials, should have known in that time period that they had a duty not to affirmatively and actively encourage sexual abuse of students. But could they have known that their conduct gave Wright any encouragement? The only actions of theirs that could possibly have been construed by Wright as encouragement was their handling of the Judy Grove allegations in 1979.[6] Let us examine that situation, objectively, as *Harlow* requires.

What situation did Smith and Miller find themselves in? It is undisputed that Judy Grove had made allegations that Wright had attacked her in his home the previous summer. It is also undisputed that Wright denied the attack. Smith and Miller had to make a choice of whether or not to believe Wright's denial of the incident. They accepted Wright's denial,[7] and yet took the further

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5 Smith, Miller and Shuey agree with Judge Stapleton's resolution of that question; the existing record in *Stoneking* is inadequate "to permit a fact finder to conclude that Wright understood the administration to favor his misdeeds."

6 The Richard DeMarte incidents, discussed in the panel opinion at pp. 16-18, App. pp.18-20, have no bearing whatsoever on this case, since there is absolutely no evidence or allegation in this voluminous record that Wright was aware of them; thus he could not have drawn any encouragement from those alleged incidents.

7 It is ironic to note that even if Wright was truthful in denying the assault on Sowers, Smith's and Miller's determination would still be available as a "weapon" for Wright to use in any subsequent nonconsensual en-

prudent step of warning him never to be alone with female students again.

The record in the Court below is absolutely barren of any further alleged incidents involving Wright between 1980 and 1983 while Stoneking was a student. From the point of view of Smith and Miller, they had dealt properly with a difficult situation. If they reasonably believed that Wright had not committed the alleged assault, they cannot be held to "knowledge" that they *encouraged* further assaults! Even if a jury were later to conclude that Wright did in fact assault Judy Grove in 1979, it cannot fault Smith and Miller for having reached the opposite conclusion when they had both Wright and Grove in front of them. This Court has previously established that it is not the province of the judiciary, or jury, to second guess the entirely reasonable choices made by professionals in the course of their duties, *see Youngberg v. Romeo*, 457 U.S. 307 (1982); likewise, the judgment of Smith and Miller should not be subject to a second guess by the jury.

Smith, Miller and Shuey are entitled to qualified immunity and to be dismissed from the case entirely; this Court should grant certiorari and dismiss those administrators.

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counters with female students. In that situation, would Smith's and Miller's accurate assessment of the situation be the "moving force" behind the alleged assaults on Stoneking? Certainly not.

D. The Court of Appeals Has Improperly Applied the Principles of Municipal Liability Under City of Canton *to Individual Defendants*

In its Opinion, the Court of Appeals relied on this Court's decision last term in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989), in which this Court established that, before a municipal body can be held liable for damages under § 1983 on a theory that municipal officers were inadequately trained, the Plaintiff must show that such a failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact.

At page 10 of its slip opinion, App. at p. 12, the Court of Appeals suggests that the *City of Canton* case provides an independent basis for liability of appellants Smith and Miller. The Court held that the defendants, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [Stoneking] constitutional harm."[8] It then discussed evidence of how defendants Smith and Miller handled various situations they were faced with. Finally, in

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8 Smith and Miller respectfully submit that, even on the "evidence" cited by the Court of Appeals, it is impossible to find that they "directly caused" any constitutional harm. The band director Edward Wright caused the direct harm to Stoneking; the most the Court of Appeals could say about Smith and Miller's conduct was that they somehow condoned Wright's behavior by discouraging student complaints. *See* discussion at page 26, *supra*. This is hardly the kind of "direct" cause of harm required by *Rizzo*, *infra*.

its Order disposing of the appeal, the Court dismissed the school superintendent, Frederick Shuey, in his individual capacity only,[9] leaving the principal Frederick Smith and the assistant principal Richard Miller as defendants in their individual capacities.

It appears from the Court's opinion that the conduct of those two school administrators, in the performance of their official duties for the school district, exposes them to personal liability in their individual capacities. Yet the Court give no explanation of any sort as to the source of this *personal* liability.

Since *City of Canton* deals exclusively with municipal liability, its application to a case involving (at this stage) only municipal officials is tenuous at best; at worst, it is an erosion of the principle enunciated in *DeShaney*.

In the *City of Canton* case, Plaintiffs alleged that the City of Canton failed to adequately train its police officers to determine when persons taken into their custody should receive medical attention. The Court held that the City might be liable if the Plaintiff could establish that

> in light of the duties assigned to specific officers or employees the need for more or

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[9] The Court found no "affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district", and therefore no basis for liability in his individual capacity. Slip Opinion at p. 24, App. at p. 26.

> different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id., 109 S.Ct. at 1205.

While it might be appropriate to impose liability on the policy-making body itself (the City), the application of this principle to the municipal officers who implement the policies is far from clear. It may be that those officers who can be said to create such policies of indifference might be found liable themselves *in their capacities as policymakers* (*i.e.* in their official capacities). But there is no justification for holding those persons liable in their individual or personal capacities.

In order to determine the capacity in which a person may be found liable, it is necessary to examine the capacity in which he acts when he does the things which allegedly result in liability. If a public official in the performance of his official duties acts in such a way as to directly violate the Constitutional rights of some person, it may be that the public official can be held liable in his official capacity. If the duty to act arises be virtue of one's official responsibilities, official capacity liability may result.

Thus, school administrators may have a duty in their official capacities not to encourage teachers to

sexually abuse students. A breach of that duty may result in official capacity liability. But the Court of Appeals held that Smith and Miller might be found liabile in their *individual* capacities if a jury believes they breached that official duty. Yet the Court does not suggest what the source of their duty in their individual or personal capacities might be. Is the Court of Appeals saying that, above and beyond their official duties as school administrators, these men owed some personal duty to Stoneking? Is that simply the "duty to protect" wearing a new disguise?

The most the Court of Appeals could say about the allegations in this case is that "a jury could reasonably conclude that . . . discouragement of complaints [by Smith and Miller] amounted to a communication of condonation of the teacher's behavior," Slip Opinion at p. 23, App. at p. 25. While the Court believes that such a jury finding would satisfy the "affirmative link" requirement of *Rizzo v. Goode*, 423 U.S. 362 (1976), a closer look at *Rizzo* reveals just the opposite.

In *Rizzo*, a group of citizens filed a class action against the City of Philadelphia police force, seeking injunctive relief under § 1983. The District Court found that none of the respondents in that case had actually participated in the deprivation of the rights of citizens, but found a "pattern" of discouraging citizen complaints and a tendency to "minimize the consequences of police misconduct." *Id.*, 423 U.S. at 368-69. Based upon those findings, the District Court required the City to prepare a set of guidelines to improve the handling of citizen

complaints, and entered those new guidelines as an Order of Court. The United States Court of Appeals for the Third Circuit affirmed.

This Court reversed that judgment on several bases, including the lack of a justiciable case or controversy and out of principles of federalism. The Court discussed the merits of the § 1983 claim, however:

> Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

Id., 423 U.S. at 376.

This case is no different than *Rizzo*. To paraphrase this Court, Stoneking posits a Constitutional "duty" on the part of Smith and Miller (and a corresponding right in herself) to "eliminate" sexual abuse of students by teach-

ers; a "default" of that affirmative duty under her formulation should result in an award of damages under § 1983. Her "evidence" in support of a default of that alleged duty is nothing more than a claim that student complaints (like the citizen complaints in *Rizzo*) were discouraged and minimized. She does not allege that Smith or Miller committed any act which directly deprived her of rights (just like the respondents in *Rizzo*).

If the facts in *Rizzo* were insufficient to warrant injunctive relief under § 1983, the nearly analogous allegations of this case should not be sufficient to warrant an award of damages under § 1983.

The alternative rationale adopted by the Court of Appeals is not sufficient to support a finding of personal liability against Smith and Miller in their individual capacities; they should have been dismissed along with Shuey. This Court should grant certiorari and declare that *City of Canton* cannot be extended to create liability for municipal officers in their individual capacities.

IX. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.

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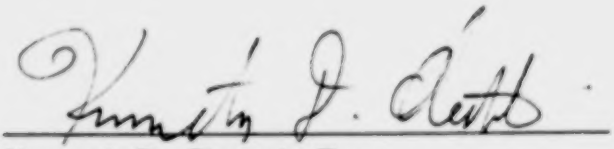
X. CERTIFICATION OF MEMBERSHIP

It is hereby certified that both Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



Kenneth D. Chestek, Esq.

XI. PROOF OF SERVICE

I hereby certify that three copies of the within Petition for Writ of Certiorari were served on Deborah W. Babcox, Esq., 222 West Washington Street, Bradford, PA 16701 and Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 13day of November, 1989.

Kenneth D. Chestek, Esq.